No. 78-1644

In the Supreme Court of the United States

OCTOBER TERM, 1978

SAUL KANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 43-45) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1979. A petition for rehearing was denied on February 27, 1979 (Pet. App. 46-47). On March 28, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to April 28, 1979. The petition was filed on April 30, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of out-of-court statements of petitioner's co-conspirators, including a reference to a reputed organized crime figure, constituted reversible error.

2. Whether the district court improperly admitted prior consistent statements of a government witness.

3. Whether petitioner was placed twice in jeopardy on the same charges.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner and co-defendants Michael Clark and James Plumley were convicted of obstructing interstate commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and conspiracy to commit that offense, in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. App. 43-45).

The evidence showed that petitioner and his confederates engaged in a scheme to extort $12,000 from Bernard Sandson, the proprietor of Sandson's Bakery in McKee City, New Jersey. Petitioner initiated this effort by calling Sandson on February 14, 1976, and telling him that he had learned of a union organizing effort about to be launched against Sandson's firm.[1] Petitioner added that Sandson could call him if he could be of any assistance (Tr. 2.55).

[1]Sandson knew petitioner as a salesman for a local bakery supply firm (Tr. 2.52-2.53).

On February 26, 1976, Sandson was visited by Clark and Plumley, who posed as organizers for the Eastern Conference of Teamsters (Tr. 2.64-2.66, 2.70).[2] They told Sandson that a union organizing effort at his bakery would start on March 1, 1976 (Tr. 2.67). Sandson, who was scheduled to be out of town on that date, asked them to postpone their picketing. Clark and Plumley refused but did agree to meet with Sandson again later that day (Tr., 2.68).

At the second meeting, held on a street corner in Phiadelphia (Tr. 2.71), Clark informed Sandson that his superiors had rejected any delay in the organizing drive (Tr. 2.71-2.72). He added that he was a "fair-haired boy of Tony Pro"[3] and was "out to make a name for himself" (Tr. 2.72). Sandson, aware of Provenzano's reputation for violence, immediately became afraid for himself and his business (Tr. 2.87). Before terminating this short meeting, Clark warned Sandson to be prepared for the organizers on March 1 (Tr. 2.72).

Sandson, recalling his earlier conversation with petitioner, telephoned petitioner the next day and asked whether he could help delay the organizing drive until Sandson returned home, on March 2 (Tr. 2.87). Petitioner

[2]Clark and Plumley were members of Teamsters' Local 107, located in Philadelphia, but they were not employed as organizers for either the Local or the Eastern Conference.

[3]This was an apparent reference to Anthony Provenzano, an individual connected with the Teamsters' union and with labor racketeering charges involving that union. See *United States* v. *Giacalone*, 541 F. 2d 508 (6th Cir. 1976) (en banc); *United States* v. *Provenzano*, 334 F. 2d 678 (3d Cir.), cert. denied, 379 U.S. 947 (1964).

called back the following day, February 28, and told him that he had secured a postponement of the union's effort (Tr. 2.88).

Sandson returned home on March 2 and was contacted by petitioner, who said that the matter could be "straightened out" (Tr. 2.90). Sandson took this to mean that he would have to pay some money to avoid having his business organized (*ibid.*). The next day, Clark and Sam Consiligia came to the bakery and confronted Sandson, telling him that an organizing effort would only make problems for Sandson's business (Tr. 2.91-2.92, 3.37-3.38). After Clark left the office, Consiligia offered Sandson two years of labor peace in return for a payment of $12,000 (Tr. 3.39). He suggested that Sandson think over the offer and call petitioner to report his decision (Tr. 3.40).

Sandson considered the proposal but decided to reject it. On March 4 he called petitioner and told him that he was not interested in the "arrangement" (Tr. 3.42). Sandson never heard from any of the defendants thereafter (Tr. 3.45).

ARGUMENT

1. Petitioner contends (Pet. 24-29) that the evidence of his participation in the conspiracy, independent of the statements of his co-conspirators, was insufficient to support admission of the statements. The court of appeals correctly rejected this claim. The record clearly reflects that the evidence *aliunde* was sufficient to allow

introduction of the statements under Fed. R. Evid. 801(d)(2)(E), the co-conspirator exception to the hearsay rule.[4]

The evidence showed that petitioner first alerted Sandson to the upcoming union organizing campaign and offered his assistance. Shortly thereafter, Sandson was visited by petitioner's co-defendants and informed that they would be organizing his bakery. When Sandson sought to have this campaign postponed for a few days, a call to petitioner was enough to halt the organizing effort. And during a subsequent call from petitioner, in which he told Sandson that the matter could be "straightened out," Sandson began to realize that a simple payoff might guarantee him labor peace. After being approached by others with a payoff request, Sandson telephoned petitioner and told him that he refused to agree to the "arrangement." The organizing effort never materialized. In sum, substantial non-hearsay evidence, together with petitioner's own statements to Sandson, provided sufficient proof of his participation in the conspiracy to

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[4]The circuits have applied varying standards—"prima facie" showing, "preponderance of the evidence," "substantial, independent evidence"—in determining whether the independent evidence of a defendant's participation in a conspiracy is sufficient to warrant admission of co-conspirator statements against him. See, *e.g.*, *United States* v. *James*, 590 F. 2d 575, 581 & n.4 (5th Cir. 1979) (en banc), cert. denied, Nos. 78-1412, 78-6369 & 78-6431 (June 4, 1979); *United States* v. *Santiago*, 582 F. 2d 1128, 1133-1135 (7th Cir. 1978); *United States* v. *Stanchich*, 550 F. 2d 1295, 1297-1299 & n.4 (2d Cir. 1977). Petitioner does not contend that the result in his case would differ depending upon which of these standards is applied, and, in view of the strength of the independent evidence tending to prove petitioner's participation in the conspiracy here, this is not an appropriate vehicle for deciding what the standard should be.

make admissible the out-of-court statements made by his co-conspirators during the course and in furtherance of the conspiracy.[5]

Petitioner also argues (Pet. 28-29) that the trial judge erred in not instructing the jury to make its own initial determination respecting petitioner's participation in the conspiracy before considering the statements of his co-conspirators. Petitioner cites no authority to support this assertion. It is well settled under Fed. R. Evid. 104(a) that the admissibility of co-conspirators' statements is a question of law for the judge, not the jury. See, *e.g.*, *United States* v. *James, supra*, 590 F. 2d at 579-580 (collecting cases); *United States* v. *Enright*, 579 F. 2d 980 (6th Cir. 1978); *United States* v. *Bell*, 573 F. 2d 1040, 1043 (8h Cir. 1978).

2. Petitioner claims (Pet. 30-31) that Sandson's testimony concerning Clark's reference to "Tony Pro" was "highly prejudicial" and of only "remote relevance" and that the district court therefore erred in failing to exclude it under Fed. R. Evid. 403. The evidence was highly relevant, however, because Sandson's association of that name with incidents of violence was intended to make him fear that his business would be harmed if he did not accede to the conspirators' demands; indeed, Sandson

[5]Petitioner cites three cases (Pet. 25-26) that, he suggests, cannot be reconciled with a finding that the evidence in this case was sufficient to support admission of the co-conspirator statements. Two of the decisions were rendered by the same circuit in which this case was decided and thus would create no conflict among the circuits even if viewed as involving similar facts. The third, *United States* v. *Palacios*, 556 F. 2d 1359 (5th Cir. 1977), concerned a defendant in a drug conspiracy trial whose proven links to the drug transportation in question were much less direct than petitioner's involvement in the conspiracy here.

testified that it had precisely that effect. Proof that Clark had mentioned the name to Sandson thus would help establish the extortion element of a Hobbs Act violation—"the wrongful use of actual or threatened force, violence, or fear" to induce another to surrender property. See *United States* v. *Zito*, 467 F. 2d 1401, 1404 (2d Cir. 1972); 18 U.S.C. 1951(b)(2). Accordingly, any prejudicial effect of the statement was outweighed by its probative value, and the trial judge did not abuse his discretion in admitting it into evidence. See, *e.g.*, *United States* v. *Bohr*, 581 F. 2d 1294, 1299 (8th Cir. 1978), cert. denied, No. 78-5493 (Nov. 6, 1978); *United States* v. *Calvert*, 523 F. 2d 895, 908 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).[6]

3. Petitioner contends (Pet. 32-36) that prior consistent statements of a government witness were improperly admitted.

On cross-examination of Sandson, defense counsel sought to impeach him by suggesting that his testimony was a recent fabrication resulting from a strong anti-union prejudice. They elicited the facts that Sandson had not reported the defendants' extortion attempt to the authorities even though he had discussed it with his attorney (Tr. 3.63-3.65), that other unions had made unsuccessful attempts to unionize the bakery (Tr. 3.73-3.75), and that Sandson had not told a police detective or

[6]Petitioner's reliance on *United States* v. *Long*, 574 F. 2d 761 (3d Cir. 1978), cert. denied, No. 78-626 (Nov. 27, 1978), is misplaced. *Long* recognizes that a trial judge has broad discretion in deciding whether to exclude evidence under Rule 403 and that his decision to admit the evidence will be overturned on appeal only if it is arbitrary or irrational. *Id.* at 767. Here, of course, there was a rational basis for the trial court's action.

the grand jury of Clark's reference to "Tony Pro" (Tr. 3.62-3.63). The effect of this line of questioning was, as the district court concluded, "to question [Sandson's] credibility and [suggest a] recent fabrication" (Tr. 3.212).

Fed. R. Evid. 801(d)(1)(B) allows the admission of a prior statement consistent with a witness' testimony if it "is offered to rebut an express or implied charge against [the witness] of recent fabrication or improper influence or motive." In this case, petitioner's attack on Sandson's motive for testifying amounted to a clear suggestion that the testimony was such a fabrication. Hence, the court did not abuse its discretion in allowing Sandson, on re-direct, to refer to consistent statements, made in his daily diary, that tended to rebut the implied charge of fabrication. *United States* v. *Herring*, 582 F. 2d 535, 541 (10th Cir. 1978); *United States* v. *Lanier*, 578 F. 2d 1246, 1256 (8th Cir. 1978), cert. denied, No. 77-6967 (Oct. 2, 1978).[7]

[7]Petitioner further contends (Pet. 35-36) that testimony of Albert Black and Morris Ginsberg was improperly admitted. Black testified that Sandson called him immediately after Clark's and Consiligia's extortion effort and sought the services of Black's security guards to protect his bakery (Tr. 5.95-5.97). This testimony was admissible either as a prior consistent statement of Sandson's used to rebut petitioner's claim of recent fabrication or as evidence of Sandson's mental state (*i.e.*, fear) following his confrontation with Clark and Consiligia (Fed. R. Evid. 803(3)). Ginsburg's testimony related to a similar scheme that the defendants had used at his bakery to extort money in return for labor peace (Tr. 4.134-4.143). Fed. R. Evid. 404(b) authorizes the use of similar act testimony in order to establish intent or plan. See *United States* v. *Sparks*, 560 F. 2d 1173, 1175 (4th Cir. 1977); *United States* v. *Nolan*, 551 F. 2d 266, 271 (10th Cir.), cert. denied, 434 U.S. 904 (1977). Moreover, the trial judge minimized any prejudice that might have resulted from this evidence by cautioning the jury that the testimony was admitted for the limited purpose of showing petitioner's intent (Tr. 8.45). *United States* v. *Robinson*, 560 F. 2d 507, 516 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978).

4. Petitioner also contends (Pet. 39-40), in a claim not presented to the court below (see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977)), that he was placed twice in jeopardy on these charges. As petitioner acknowledges (Pet. 12, 39), the first jury panel was selected, but not sworn, prior to being dismissed. It is well established that jeopardy does not attach until the jury has been both empaneled and sworn. *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978); *Serfass* v. *United States*, 420 U.S. 377, 388 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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